(5)

No. 06-618

FILED
JAN 16 2007
CLERK

IN THE

Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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OPPOSITION TO SUGGESTION OF MOOTNESS

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OPPOSITION TO SUGGESTION OF MOOTNESS

Having filed an appeal, appellant now seeks to avoid any examination of the merits of its position and instead to deny relief altogether on grounds of abatement and mootness. Appellant's argument is premised on the misguided notion that the legal entity created to serve as the defendant in civil actions under the Congressional Accountability Act (CAA)—the "employing office"—ceases to exist when a Member leaves Congress. It does not. The language of the Act, as well as its structure and purpose, show that the expiration of a Member's term does not sound the death knell for actions properly commenced against an employing office.[1]

[1] CAA actions against Senate offices are defended by the Office of Senate Chief Counsel for Employment, which does not trouble to inform

The Court recognized more than half a century ago that the dissolution of a corporation does not necessarily moot a case: "a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949); *see Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 673-74 (1944) ("the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant"). Like a corporation in dissolution, the employing office for a Member whose term has expired has more than "enough life remaining to litigate its actions," as an examination of the statute reveals.

1. Examination of the Statute Shows that this Case Is Not Moot

The CAA applies eleven laws regulating the workplace to "the legislative branch of the Federal Government" generally. 2 U.S.C. § 1302(a). The statute provides that civil actions alleging violations of the incorporated statutes may be brought only against the pertinent "employing office," 2 U.S.C. § 1408(b), which is defined in 2 U.S.C. § 1301(9) to include

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the Court that the mootness argument was pressed in the *Bastien* case in the Tenth Circuit, where it was rejected. Specifically, after the court of appeals held that the Speech or Debate Clause did not deprive courts of jurisdiction to hear CAA claims, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S.Ct. 396 (2005), Senator Campbell's term expired, and the Office moved to vacate the judgment on grounds of mootness. The Tenth Circuit denied the motion but said it could be raised in district court on remand. 409 F.3d 1234 (10th Cir. 2005). The district court then ruled against the Office on the merits of abatement and mootness. 2005 WL 3334359 (D.Colo. 2005). At that point, the Office attempted an interlocutory appeal, arguing that the district court's order abridged sovereign immunity and the separation of powers and so was appealable under the collateral order doctrine. The Tenth Circuit disagreed and dismissed the appeal, 454 F.3d 1072 (10th Cir. 2006), and this Court recently denied certiorari, ___ S.Ct.___, 2007 WL 36160 (Jan. 8, 2007).

(among other things) "the personal office of a Member of the House of Representatives or of a Senator" and "a committee of the House of Representatives or the Senate or a joint committee." The CAA does not provide for suits against individuals, whether they are individual Members, committee chairmen or unelected staff.

The focus on offices rather than individuals as defendants bespeaks an interest in permanence and continuity. In this regard, committees remain in business regardless of the vagaries of election results or the terms of particular Members, so a similar mootness argument could not be made in a CAA case where the plaintiff is a committee staffer. There is nothing in the Act to suggest that those congressional employees who serve a Member are entitled to any less favorable treatment than those who work for a committee.

Here 2 U.S.C. § 1415 is particularly instructive. Subsection (a) of Sec. 1415 creates a special Treasury fund to satisfy judgments and settlements against employing offices, "[e]xcept as provided in subsection (c)," which exempts money needed to address certain OSHA and ADA matters. But nothing in Section 1415 exempts the money needed to satisfy a judgment against the office of a Member whose term has expired. On the contrary, the statute generally appropriates "such sums as may be necessary to pay such [non-exempted] awards." 2 U.S.C. § 1415(a).

Other provisions of the CAA likewise demonstrate the broad sweep of the "employing office" concept. For example, employing offices are prohibited from retaliating against employees who exercise rights under the Act, 2 U.S.C. § 1317(a); they assume affirmative obligations, such as granting protected leave for employees under the Family and Medical Leave Act or providing a safe workplace under OSHA, §§ 1312(a); 1341; employing offices attend mediation sessions, §1403(b); they are the named respondent in administrative claims and (as noted) the defendant in judicial actions,

§§ 1405(a), 1408(b); and they are defended in litigation by special counsel provided by Congress, *see, e.g.*, § 1408(d).

Judge Brown (joined by Judges Sentelle and Griffith), concurring in the judgment below, commented on the unique structure of the CAA:

> The personal office of a member . . . is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor a chartered corporation, nor a trust, nor a partnership. It is an organizational division within Congress, establish for Congress' administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of Congress, as to whom the member (acting on behalf of Congress) has supervisory control.

Appendix to Appellant's Jurisdictional Statement (App. App.) at 47a.

Instead of establishing the employing office, Congress could have provided for the naming of Members as defendants in CAA cases. *See Davis v. Passman*, 442 U.S. 228, 249 (1979) ("Congress could, of course, make *Bivens*-type remedies available to its staff employees") (Burger, C.J., dissenting). Congress chose instead to establish the employing office construct to cover the entire Legislative Branch, including areas such as committees or the Congressional Budget Office where the expiration of a Member's term is plainly inconsequential. 2 U.S.C. § 1301(9).

Even assuming that Congress included Members as possible CAA defendants and required them to pay judgments out of their own pockets, the expiration of a Member's term would not moot a case as long as there was a live dispute over money damages. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 498 (1969). Nor is there mootness here, where the fund created to satisfy CAA judgments provides no exemption for

situations in which a Member's term has expired. 2 U.S.C. § 1415.

Appellant claims that mootness and abatement occur whenever a Member leaves Congress. Adoption of this view could eviscerate the statute. Members accused of discrimination would have a profound incentive to delay the ultimate resolution of the case, until such time as they are ready to leave the particular office they hold.[2] For example, a typical staffer in a House Member's office would have at most two years to complete her case—including mandatory administrative exhaustion at the outset, *see* 2 U.S.C. § 1408(a), and continuing through final judgment in Federal court—to be assured of any rights under the CAA. A Member could short-circuit a claim at any point by resigning, depriving the aggrieved employee of any hope of remedy. This is an odd construction of a statute that was expressly passed to treat congressional employees the same as those in private enterprise: "the purpose of this legislation is to end the environment in this country where we have two sets of laws—one for Capitol Hill and the one for everybody else * * * It will end the situation where employees of Congress do not have the same employment and safety rights and access to the courts for the enforcement of those rights that private sector employees have." 141 Cong. Record S533 (remarks of Senator Grassley, co-sponsor and Republican floor manager of the CAA).

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[2] As noted in appellee's Motion to Dismiss or to Affirm at 2, appellant apparently sought to delay the final resolution of this case by failing to take the direct appeal to this Court available in September 2004, when the district court rejected appellant's Speech or Debate Clause argument. *See* 2 U.S.C. § 1412.

After the remand in *Bastien* (*see* n.1 above), the district court analyzed the language, structure and underlying purpose of the CAA to find that claims do not abate upon expiration of a Member's term:

> [t]he court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

2005 WL 3334359 at *3.

Bastien directly answers the suggestion of mootness here, but appellant does not address it. Instead, appellant relies on authority in which courts have confronted abatement in the context of legislation specifically dissolving (and fully extinguishing) a government agency or corporation. *See Asociacion de Empleados del Area Canalera (ASEDCA) v. Pan. Canal Comm'n*, 453 F.3d 1309, 1312 (11th Cir. 2006) ("On September 30, 2004, while Appellants' suit was pending, Congress passed a joint resolution that amended the Act and terminated the PCC and OTA as of October 1, 2004."). In these circumstances, Congress' desire to abate is manifest in the statute.

Similarly, in *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. at 636-37, Congress expressly dissolved the Defense Supplies Corporation (DSC) through a Joint Resolution and also provided for the substitution of another government corporation in litigation begun by DSC; the Court rejected an argument that a judgment obtained by DSC should be abated because the substitution was untimely. And in *Skolnick v. Parsons*, 397 F.2d 523, 524 (7th Cir. 1968), the lawsuit was deemed abated because the defendant President's

Commission on Law Enforcement and Administration of Justice "terminated by Presidential Order prior to the filing of the complaint."

In contrast, the CAA contains nothing dissolving an employing office upon the expiration of a Member's term. The cases cited by appellant do not support its plea for abatement.

2. The Inadequacy of Appellant's Other Arguments

Sovereign immunity. Appellant begins its brief with a head fake, cautioning that "the United States, as sovereign, is immune from suit save as it consents to be sued" and that waivers of sovereign immunity must not be implied. Suggestion of Mootness at 2. Sovereign immunity, however, is not an issue here, as the CAA expressly waived it for suits by covered employees: "Congress . . . unequivocally waived the sovereign immunity of a Member's personal office facing [CAA] allegations." App. App. at 11a.

Appellant's assertion of sovereign immunity here is simply misdirection, as the Tenth Circuit noted in dismissing an attempted appeal of the district court's order in *Bastien* finding no mootness:

> As much as the Office tries to couch its argument in terms of immunity and separation of powers, the issues are abatement and mootness. . . . These issues do not involve either immunity or separation of powers concerns. When Ms. Bastien originally filed this action, the district court had jurisdiction to hear the matter. The fact that Senator Campbell's term subsequently expired does not raise questions of either immunity or separation of powers.

454 F.3d at 1075.

The dispute over monetary relief. An action may be considered moot if there is no longer any relief that a successful plaintiff can obtain, and appellant suggests that the expiration

of Senator Dayton's term deprives Hanson of any remedy. In fact, though, Hanson can recover any monetary sums awarded from the funds authorized by Congress to satisfy judgments rendered under the CAA. 2 U.S.C. § 1415(a). Indeed, the only element of relief that ordinarily would be affected by a Member's departure from office is reinstatement. And long before Senator Dayton announced his decision not to run for reelection, Hanson stipulated that he was not seeking an order requiring his return to the job and would instead accept monetary relief. *See* Docket Entry 19 in No. 03-1149 (D.D.C.) (Oct. 30, 2003). The parties vigorously dispute Hanson's entitlement to a monetary remedy, which means the case is alive.

This Court confronted a similar issue in *Powell v. McCormack*, *supra*. There, the congressional officers being sued argued that Adam Clayton Powell's lawsuit was moot, because he had already won reelection. The injunction he had requested seeking reinstatement to the House of Representatives was, according to the defendants, unnecessary, and the lawsuit mooted. Rejecting that claim, the Court held:

> [E]ven if respondents are correct that petitioners' averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties.

395 U.S. at 498; *see also Bond v. Floyd*, 385 U.S. 116 (1966) (the mootness of a "primary" claim does not necessarily mean that all "secondary" claims are similarly moot).

There is still abundant relief that Brad Hanson can recover if his claims are successful, and a fund exists to pay any monetary judgment. 2 U.S.C. § 1415. His case is not moot.

Vacatur. Finally, appellant asks that the D.C. Circuit's judgment be vacated, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The petitioner in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), made a similar plea following settlement of a case for which certiorari had been successfully sought. The Court held that the petitioner had not borne the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur," *id.* at 26, because this was not a situation in which "a controversy . . . has 'become moot due to circumstances unattributable to any of the parties.'" *Id.* at 23, *quoting Karcher v. May*, 484 U.S. 72, 82-83 (1987). Rather, the petitioner's "voluntary forfeiture of review constitutes a failure of equity." *U.S. Bancorp*, 513 U.S. at 26.

The Court also found the request for vacatur inconsistent with the public interest: "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system." *Id.* at 27. Thus the Court denied the request for both public and private reasons.

Appellant here does not meet the demanding standards of *U.S. Bancorp* and *Karcher v. May*. On the contrary, the Office is engaged in a transparent effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment," in a situation in which the supposed mootness is caused by its own conduct. In particular, appellant has tried to run out the clock by failing to take advantage of the expedited review available under the CAA. *See* n.2 above.

CONCLUSION

Senator Dayton's decision to leave public office does not nullify this lawsuit. Appellant's claims of abatement and

mootness are ill-founded, and the suggestion of mootness should be rejected.

Respectfully submitted,

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